Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1647

IN THE MATTER OF
FRANK C. McGIRR,

Petitioner,

v.

DIVISION OF VETERANS AFFAIRS, EXECUTIVE DEPARTMENT, STATE OF NEW YORK, FRANK V. VOTTO, DIRECTOR, and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	22
APPENDIX A – Order of the New York Court of Appeals filed February 22, 1978	1a
APPENDIX B – Opinion and Order of the New York Appellate Division of the Supreme Court filed February 28, 1977	5a
APPENDIX C – Opinion and Order of the New York Supreme Court Special Term filed February 23, 1976	12a
APPENDIX D – Opinion and Order of the New York Appellate Division of the Supreme Court filed January 20, 1975	17a
APPENDIX E – Opinion and Order of the New York Supreme Court Special Term filed April 2, 1974	21a

AUTHORITIES CITED

Cases: Page

Arnett v. Kennedy,
416 U.S. 134 (1974). 9, 10, 11, 22

Bell v. Burson,
402 U.S. 535 (1971) 9

Berns v. Civil Service Commission,
537 F.2d 714 (2nd Cir. 1976) 12

Bernstein v. Industrial Commissioner,
398 N.Y.S.2d 437 (App. Div. 1977) 16

Board of Regents v. Roth,
408 U.S. 564 (1972) 10

Boehning v. Indiana State Employees Association,
423 U.S. 6 (1975) 11

Bowles v. Willingham,
321 U.S. 503 (1944) 18

Central Trust Co. v. Garvan,
254 U.S. 554 (1921) 18

Connell v. Higginbotham,
403 U.S. 207 (1971) 9

Corn Exchange Bank v. Coler,
280 U.S. 218 (1930) 18

Ewing v. Mytinger & Casselberry,
339 U.S. 594 (1950) 19

Fahey v. Mallonee,
332 U.S. 245 (1947) 18

Page

Fuentes v. Shevin,
407 U.S. 67 (1972) 10

Goldberg v. Kelly,
397 U.S. 254 (1970) 9

Henry v. Mississippi,
379 U.S. 443 (1965) 19

Matter of Johnson v. Downstate Medical
Center, 41 N.Y.2d 1061, 396 N.Y.S.2d 172,
364 N.E.2d 837 (Ct. App. 1977) 15, 16

Morrissey v. Brewer,
408 U.S. 471 (1972) 9

North American Cold Storage Co. v. Chicago,
211 U.S. 306 (1908) 18

Phillips v. Commissioner,
283 U.S. 589 (1931) 18

Sanford, et al. v. Rockefeller,
364 N.Y.S.2d 450, 324 N.E.2d 113
(Ct. App. 1974) 11

Sniadach v. Family Finance Corp.,
395 U.S. 337 (1969) 10

Wolff v. McDonnell,
418 U.S. 539 (1974) 9

Statutes and Regulations:

United States Constitution, Fourteenth
Amendment 2, 9, 18, 22

	Page
28 U.S.C. 1257(3)	2
New York Civil Practice Law and Rules § 217	5, 20
New York Civil Service Law § 75	5, 7, 11, 13, 15
New York Civil Service Law, Rules and Regulations § 5.3(d)	4, 6, 14, 20
New York Civil Service Law, Rules and Regulations § 21.3(b)	3

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

Petitioner respectfully petitions that a Writ of Certiorari issue to the Court of Appeals, State of New York to review its Order entered February 22, 1978 affirming the decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, of February 28, 1977 dismissing the proceedings.

OPINIONS BELOW

The Opinion and Order of the Court of Appeals, State of New York (___ N.Y. 2d ___, ___ N.E. 2d ___) is printed in Appendix A, *infra*. The Opinion and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (56 App. Div. 2d 653, 392 N.Y.S. 2d 44) is printed in Appendix B, *infra*. The Opinion and Order of the Special Term, Part One of the Supreme Court of the State of New York (unpublished) is printed in Appendix C, *infra*. The Opinion and Order of the Appellate Division of the State of New York, Second Judicial Department (47 App. Div. 2d 541, 363 N.Y.S. 2d 107) is printed in Appendix D, *infra*. The Opinion and Order of the Court of first instance, Special Term, Part One of the Supreme Court of the State of New York (unpublished) is printed in Appendix E, *infra*.

JURISDICTION

The Order and Opinion of the Court of Appeals, State of New York was entered on February 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and the Rules of the Supreme Court of the United States Rule 19(1)(a).

QUESTIONS PRESENTED

1. Was the Petitioner, a classified New York employee, entitled to a pretermination hearing under the provisions of New York State Law and the due process clause of the Fourteenth Amendment of the United States Constitution?

2. Was the decision of the Court of Appeals of the State of New York based on adequate independent state grounds?

STATUTES AND REGULATIONS INVOLVED

United States Constitution Fourteenth Amendment

28 U.S.C. 1257(3)

New York Civil Practice Law and Rules §217

New York Civil Service Law §75

New York Civil Service Law, Rules and Regulations §5.3(d)

New York Civil Service Law, Rules and Regulations §21.3(b)

STATEMENT OF THE CASE

Petitioner was a state Veterans Counselor for the Division of Veterans Affairs, Executive Department, State of New York. He was a member of the New York State Classified Civil Service, Competitive Class and held a permanent appointment. He had been employed by the State of New York from April 5, 1958.

On December 14, 1971, Petitioner called his office and reported that he was ill. At this time, Petitioner had accumulated 36 days of sick leave credits pursuant to Rule 21.3(b), New York Civil Service Law, Rules and Regulations (McKinney 1973). Petitioner did not report to work for the balance of the week. The following week, on December 20, 1971, Petitioner again called his office and reported he was still ill. Petitioner had in the interim requested his physician to forward a medical report to the Petitioner's supervisor. This report was received by the Respondent on December 20, 1971.

By letter dated December 29, 1971, the Respondent by the Deputy Director of the Division of Veterans Affairs wrote Petitioner and requested:

". . . that you contact your doctor and have him submit to me a report, indicating the diagnosis of your present illness, together with a prognosis as to when you may be expected to return to duty.

In the event that we are not satisfied with the severity of your illness, we will have you examined by a state physician . . ."

Subsequently Petitioner forwarded the request to his physician. On January 13, 1972, the physician forwarded a letter, admittedly brief and less than a full report, to the Respondent. The physician at the same time forwarded to Petitioner a complete diagnostic report indicating that Petitioner suffered from an emphysema condition of the lungs. The Petitioner had, on his physician's advice during this time, removed himself to Florida.

By letter dated January 12, 1972 (the tenth working day after December 29, 1971) and without a physical examination by a state doctor as referenced in the December 29, 1971 letter, Respondent notified Petitioner that he deemed Petitioner's absense as without authorization from December 27, 1971. The letter noted that the Director of the Division of Veterans Affairs was reporting Petitioner's resignation effective December 27, 1971. The Director stated that decision was based on Rule 5.3(d), Civil Service Law, Rules and Regulations (McKinney 1973), which provided for summary dismissal by resignation of an employee deemed to have been absent without leave for a period of ten days. The letter to the Petitioner did not specify that he had any appeal rights.

The Petitioner sought reconsideration from the Division of Veterans Affair. Such reconsideration was denied. Petitioner also appealed to the State Civil Service Commission

on February 10, 1972. The Commission dismissed the appeal on June 12, 1972 on the ground that an appeal could not be brought from a "voluntary" dismissal such as a resignation. In August 1972, Petitioner commenced proceedings in the Supreme Court, for the State of New York, Special Term.

Petition of the Petitioner filed with the Court on August 25, 1972 alleged as follows in paragraph "FIFTH":

"That on January 21, 1972 and retroactive to December 27, 1971, petitioner was unlawfully and illegally discharged from said employment without any justification or cause and without a hearing or due process of law as required by Section 75 of the Civil Service Law of the State of New York and the constitution of the State of New York and of the United States."

Therefore, Petitioner had in the court of first instance noted the federal question in his initial pleading.

In the Supreme Court for the State of New York, Special Term, the Respondents moved for dismissal of the proceeding as untimely under Section 217, New York Civil Practice Law and Rules (McKinney 1973). The Supreme Court, Special Term denied the motion and Respondents took an interlocutory appeal to the Appellate Division. The Appellate Division rejected the appeal and affirmed the decision denying the motion to dismiss, 349 N.Y.S. 2d, 646 (1973). The Respondents submitted an answer and both parties moved for a summary judgment. On April 2, 1974, Supreme Court, Special Term directed that the Division of Veteran Affaris grant Petitioner a formal hearing pursuant to Section 75 of the New York Civil Service Law (McKinney 1973).

In the opinion, the Supreme Court noted that the self-executing nature of Rule 5.3(d) of the New York Civil Service Law, Rules and Regulations (McKinney 1973) was arbitrary, capricious, and an abuse of the Petitioner's due process rights (unpublished, Appendix E, *infra*).

The decision was appealed to the Appellate Division. The Appellate Division remitted the matter to the Supreme Court for a hearing on whether the Petitioner complied with the requirements of Subdivision (d) of 4 N.Y.C.R.R. 5.3, Appendix D, *infra*.

The Supreme Court, Special Term conducted a hearing on May 28, 1975, continued on June 4, 1975 and concluded on June 12, 1975. The Court found that Petitioner's absence from his employment could not be termed "without an explanation" as specified in New York Civil Service Law, Rules and Regulations §5.3(d) (McKinney 1973). The Court ordered Petitioner's reinstatement with appropriate amount of back pay to be calculated by a referee (unpublished), Appendix C, *infra*.

Respondents appealed this decision to the New York Ap-Appellate Division Second Judicial Department. The Appellate Division on February 28, 1977 reversed the Supreme Court on the law and the facts (Appendix B, *infra*). The Appellate Division addressed the federal question and concluded:

> "Under the facts of this case, *Matter of Johnson v. Downstate Med. Center* (52 AD2d 257) does not require petitioner's reinstatement. This court held in *Johnson* (p. 369) that section 5.3(d) of the Rules and Regulations of the Department of Civil Service 'as applied to . . . [the] petitioner' therein, was unconstitutional. The basis of that ruling was the fact that the petitioner therein had not been

accorded due process by reason of the fact that his employment had been terminated without his being allowed a hearing on the validity of the reason for the termination.

In the case at bar, this court had remanded petitioner's CPLR article 78 proceeding to Special Term for a hearing to resolve factual questions relating to petitioner's absence. Petitioner had previously obtained a judgment directing the Division of Veterans Affairs to grant him a hearing, but nevertheless appealed from the judgment because it did not direct his reinstatement. A full hearing was held before Special Term in May and June, 1975, and a decision favorable to petitioner was rendered on December 5, 1975. Petitioner has acquiesced in having his case heard through judicial rather than administrative proceedings, has received a full hearing with a more favorable burden of proof requirement (the Division had to satisfy a 'preponderance of the evidence,' rather than a 'substantial evidence' standard), and has in no way been denied due process of law. The parties to a lawsuit are free to chart their own course and may fashion the basis upon which a particular controversy will be resolved (see *Cullen v. Naples*, 31 NY2d 818)." 56 App. Div. 2d 653, 392 N.Y.S. 2d 44 (1977), Appendix B, p. 5a.

Petitioner appealed to the Court of Appeals. Petitioner noted as one of many points on appeal that the termination of his Civil Service employment without any of the procedures provided by Section 75 of the New York Civil Service Law (McKinney 1973), was an unconstitu-

tional deprivation of a property right without due process of law. The Court of Appeals in its opinion of February 22, 1978 held that the threshold and dispositive question was whether the proceeding was timely commenced (Appendix A). The Court in addressing the federal question stated:

> "Finally, in the light of arguments presented on this appeal, we take the opportunity to point out that *Matter of Johnson v. Director, Downstate Medical Center* (41 NY2d 1061) by no means holds that an unexplained absence may not be grounds for dismissal of an employee. Rather, the thrust of our decision in that case is that the 'full panoply of procedural due process' required by section 75 of the Civil Service Law may not be circumvented by an administrative rule creating an irrebuttable presumption of resignation. The letter and spirit of the Civil Service Law interdicts such a facile addition to the available means for bringing about a termination of tenured public employment.
>
> In any event, this proceeding being time-barred for the reasons we have indicated, the order of the Appellate Division should be affirmed." __ N.Y. 2d __, __ N.E. 2d __ (1978), Appendix A, p. 1a.

From that opinion and order, Petitioner is hereby filing this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Petitioner's rights to due process were denied when he did not receive written notice of his proposed removal, the reasons therefore, an opportunity to answer, and a hearing prior to his separation. Petitioner as a permanent New York State employee had a sufficient expectancy of continued employment to constitute a protected property interest; was entitled to fair notice; and a hearing prior to his termination, under both New York State law and the due process clause of the Fourteenth Amendment of the United States Constitution.

The decision of the Court of Appeals of the State of New York on the timeliness of Petitioner's action was not adequate to dispose of the case without reaching the Federal question, and does not bar review of the matter by the United States Supreme Court.

A. Denial of Due Process

Petitioner is entitled to the full due process protection of a notice, opportunity to respond and pre-termination hearing. In the instant matter, the New York Civil Service Law creates an entitlement or property interest in continued employment and the statute provides for due process protection prior to termination.

This Court has ruled in *Arnett v. Kennedy* 416 U.S. 134, 40 L.Ed.2d 15, 94 S. Ct. 1633 (1974) that a government job is a property interest which cannot be taken away from an employee without a hearing "at some stage of the proceedings" because of the due process guarantees of the United States Constitution. This opinion reaffirmed a well-established principle that a citizen may not have his property taken without a hearing. *Connell v. Higginbotham*, 403 U.S. 207 (1971) (loss of a state job); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (loss of welfare payments); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of a parole); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (cancellation of a prisoner's good-time credits); *Bell v. Burson*, 402 U.S. 535 (1971)

(cancellation of a driver's license); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (damaged reputation and standing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment of wages); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (seizure of mortgage property).

The plurality opinion of Justice Rehnquist in *Arnett v. Kennedy, supra*, held that "property interests" (in a Constitutional context) are both created and regulated by statute. Justice Rehnquist concluded:

> "Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." 416 U.S. at 155.

Six of the Justices writing in separate opinions held however that once a statute creates a property interest the termination or denial of that interest is regulated by the due process requirements of the Constitution. As noted by Justice Marshall:

> ". . . Accordingly, a majority of the Court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it could be conditioned on a statutory limitation of procedural due process protections, an approach which would render such protection inapplicable to the deprivation of any statutory benefit–any 'privilege' extended by Government–where a statute prescribed a termination procedure, no matter how arbitrary or unfair . . ." 416 U.S. at 211.

In the instant matter, it is clear, as developed below, that Petitioner had a "property interest" in continued employment

absent "incompetency or misconduct" created by New York law (*Arnett v. Kennedy, supra*). Petitioner also had a right to the "full panoply of procedural due process" *prior* to termination guaranteed both by statute (*Boehning v. Indiana State Employees Association*, 423 U.S. 6, 46 L.Ed. 2d 148, 96 S. Ct. 168 (1975)) and the due process clause of the Fourteenth Amendment (See concurring opinions in *Arnett v. Kennedy, supra*). The denial of Petitioner's right to prior notice, an opportunity to respond and a hearing was a violation of basic standards of due process.

Petitioner, a permanent New York State employee in the classified service was guaranteed continued employment under the New York Civil Service Laws absent "incompetency or misconduct." New York Civil Service Law §75 (McKinney 1973).

Article 75 provides in part:

> "A person described in paragraph (a), . . . of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, . . ." New York Civil Service Law §75 (McKinney 1973).

The Court of Appeals, State of New York has stated that "under section 75 of the Civil Service Law, such an employee enjoys the full range of procedural protections." *Sanford, et al. v. Rockefeller*, 364 N.Y.S. 2d 450, 324 N.E. 2d 113 (1974) at 364 N.Y.S. 2d 460.

The United States Court of Appeals, Second Circuit agreed that under New York law an employee of the classified service has an enforceable expectation of continued public employment. *Berns v. Civil Service Commission*, 537 F. 2d 714 (2nd Cir. 1976). The Court stated:

> "We agree with Judge Tenney that the summary dismissal without a prior hearing violated Berns's right to due process of law under the Fourteenth Amendment. In making this determination, a federal court must look to state law to determine whether the employee has satisfied the requirements for attaining a property interest in the job that will be protected by the due process clause. See *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed. 2d 684, 44 U.S.L.W. 4820 (1976). Cf. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944). Under New York law, Berns achieved this status when she was retained beyond her six month-probationary period. See *McCarthy v. Board of Education of Union Free School. District No. 3*, 73 Misc. 2d 225, 340 N.Y.S. 2d 679, 685 (Sup. Ct. 1973); N.Y. Civil Service Law §75; N.Y.C. R.R. Civil Service §4.5(a)(3). By remaining a police administrative aid after October 29, 1973, Berns acquired an 'enforceable expectation of continued public employment,' *Bishop v. Wood, supra*, and her employment could not thereafter be terminated in the absence of procedural safeguards, including at a minimum, a pre-dismissal hearing of the charges made against her. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Vega v. Civil Service Commn.*, 385 F. Supp. 1376 (S.D.N.Y. 1974), vacated as moot, Docket No. 75-7007 (2d Cir. 1975)." 537 F.2d at 716.

A pre-termination hearing is mandated under the provisions of Section 75 of the New York Civil Service Law (McKinney 1973). The statute provides that the employee shall have written notice, an opportunity to answer and a hearing *prior* to termination.

> "2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall

> allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required." New York Civil Service Law §75 (McKinney 1973).

It is clear that Petitioner was entitled to pre-termination notice, hearing and an opportunity to answer.

Petitioner was terminated under the provisions of Rule 5.3(d) of the New York Civil Service Law, Rules and Regulations (McKinney 1973). The Rule provides as follows:

> "(d) Unauthorized absence; when deemed a resignation.
>
> When an employee is absent without leave and without an explanation therefor for a period of 10 work days, such absence shall be deemed to constitute a resignation effective on the date of the commencement of such absence. The failure of an employee to return to his position within 10 work days following the expiration of a leave of absence, or extension thereof, without submitting an explanation therefor within such 10-day period, shall constitute a resignation which, for purposes of determining eligibility for reinstatement, shall be deemed to be effective as of the date of the commencement of such leave of absence. Nothing herein shall be deemed to excuse the unauthorized absence of an employee or his failure to return to his position upon the expiration of an authorized leave of absence, and any such failure

> may be regarded as misconduct in an appropriate disciplinary proceeding." New York Civil Service Law, Rules and Regulations §5.3(d) (McKinney 1973).

It was the practice in New York to implement this Rule without regard to the procedural process set forth in Section 75 of the Civil Service Law. In 1977, the Court of Appeals of the State of New York addressed this matter. *Johnson v. Director, Downstate Medical Center*, 41 N.Y.2d 1061, 396 N.Y.S.2d 172, 364 N.E.2d 837 (1977). The Court concluded without reaching the constitutional issues that the procedural requirements of Section 75 of the New York Civil Service Law (McKinney 1973) are applicable to such terminations. The Court stated:

> ". . . To the extent that its application may result in a discharge of the employee it may be said to parallel section 75 in purpose. But, as occurred in this instance, the employer is not required or expected to give any notice to the employee before invoking the rule. This flies in the face of one of the mandates of section 75.
>
> It cannot seriously be contended that rule 5.3(d), at least as presently implemented, provides a separate and distinct procedure for termination of employment . . .
>
> In our view the provisions of the statute preclude resort to the provisions of the rule (however vacuous it has become in practice) to terminate employment . . .
>
> In the light of the disposition of the appeal on this ground we do not reach or consider

the constitutional issues so vigorously presented." 396 N.Y.S.2d at 173.

The Court of Appeals in the instant matter noted the *Johnson, supra,* decision in a footnote.

> "Subsequently, when the present case was still wending its way through the courts, we declared rule 5.3(d) invalid as in contravention of the statutory procedures contained in section 75 of the Civil Service Law. (*Matter of Johnson v. Director, Downstate Med. Center,* 41 NY2d 1061)." Appendix A, *infra,* p. 1a.

The Appellate Division, Supreme Court of the State of New York, First Department, also discussed the Johnson, *supra,* decision in *Bernstein v. Industrial Commissioner,* 398 N.Y.S. 2d 437 (1977).

> "With respect to petitioner's claim that her termination without a hearing violates due process of law, which claim is denied by respondent in his answer, we note that the Second Department views Section 5.3(d) of the Rules and Regulations of the New York State Department of Civil Service as violative of the due process guarantees of the Fourteenth Amendment (*Johnson v. Downstate Medical Center, supra*). The Court of Appeals in *Johnson v. Downstate Medical Center,* 41 N.Y.2d 1061, 396 N.Y.S.2d 172, 364 N.E.2d 837 (1977) declared Section 5.3(d) of the Rules and Regulations of the Department of Civil Service invalid as being in conflict with Section 75 of the Civil Service Law, the latter section mandating written notice of charges of either misconduct or incompetence and a

> hearing in accordance with the procedure set forth therein. It appears that the State of New York has adopted a policy of reinstating all tenured Civil Service employees terminated pursuant to §5.3(d) of the Rules and Regulations of the Department of Civil Service and that the Office of the Attorney General does not oppose reinstatement of petitioner-appellant in view of the decision in *Johnson v. Downstate Medical Center,* 41 N.Y.2d 1061, 396 N.Y.S.2d 172, 364 N.E.2d 837 (1977)."

In the instant matter, the Court of Appeals failed to reach the constitutional question, however, it "affirmed" the order of the Appellate Division. Appendix A, *infra,* p. 1a.

The Appellate Division in the instant matter had decided that since Petitioner had received a *judicial* hearing on his matter he was not denied due process of law.

> "In the case at bar, this court had remanded petitioner's CPLR article 78 proceeding to Special Term for a hearing to resolve factual questions relating to petitioner's absence. Petitioner had previously obtained a judgment directing the Division of Veterans Affairs to grant him a hearing, but nevertheless appealed from the judgment because it did not direct his reinstatement. A full hearing was held before Special Term in May and June, 1975, and a decision favorable to petitioner was rendered on December 5, 1975. Petitioner has acquiesced in having his case heard through judicial rather than administrative proceedings, has received a full hearing with a more favorable burden of proof requirement (the Divi-

> sion had to satisfy a 'preponderance of the evidence,' rather than a 'substantial evidence' standard), and has in no way been denied due process of law . . ." Appendix B, *infra*, p. 5a.

That hearing which the Court felt (and stated) satisfied the requirement of due process was held in May and June 1975. This was a little over *three years* and *five months* after petitioner was terminated. Such a hearing did not and could not satisfy the requirements of due process as mandated by New York law or by the Fourteenth Amendment. Both Petitioner and Respondent had an interest in a timely hearing. The availability of witnesses, the fresh memories of the witnesses, and the decision-maker's flexibility in fashioning an appropriate or compromise remedy of lesser punishment–were all seriously impaired by the delay of three years. A finding that such a hearing satisfied the due process protection of the statute and the Constitution was arbitrary and certainly discriminatory to the Petitioner.

Even where this Court has rejected the need for a hearing prior to an "initial taking" of a property interest, the principal rationale has been that a hearing would be provided for before the taking became final. See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 53 L. Ed. 195, 29 S. Ct. 101 (1908) (seizure of food unfit for consumption); *Central Trust Co. v. Garvan*, 254 U.S. 554, 65 L. Ed. 403, 41 S. Ct. 214 (1921) (seizure of property under Trading with the Enemy Act); *Corn Exchange Bank v. Coler*, 280 U.S. 218, 74 L. Ed. 378, 50 S. Ct. 94 (1930) (seizure of assets of an absconding husband); *Phillips v. Commissioner*, 283 U.S. 589, 75 L. Ed. 1289, 51 S. Ct. 608 (1931) (collection of a tax); *Bowles v. Willingham*, 321 U.S. 503, 88 L. Ed. 892, 64 S. Ct. 641 (1944) (setting of price regulations); *Fahey v. Mallonee*, 332 U.S. 245, 91 L. Ed. 2030,

67 S. Ct. 1552 (1947) (appointment of conservator of assets of savings and loan association); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 94 L. Ed. 1088, 70 S. Ct. 870 (1950) (seizure of misbranded articles in commerce).

In the instant matter, not only did the Appellate Division state that the post hearing was adequate, but they subsequently reversed the trial judge on the facts.

B. State Decision Not Based on Adequate and Independent State Ground.

The decision by the Court of Appeals in the instant matter was not based on adequate and independent state grounds which would dispose of the case without reaching the Federal questions involved. It is clear that this Court will not allow frustration of the basic Federal constitutional guarantees. The consideration of the question of what are adequate independent grounds is in itself a federal question. *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564 *reh den* 380 U.S. 926, 13 L. Ed. 2d 813, 85 S. Ct. 878, and motion to set off costs den. 381 U.S. 908, 14 L. Ed. 2d 431, 85 S. Ct. 1528.

Petitioner in the present matter did not sleep on his rights. He actively pursued them within the framework of the practice in the State at that time. Petitioner has sought reinstatement both administratively and judicially at all times since January 1971. The matter was before the Supreme Court on three different occasions, the Appellate Division on two different occasions, as well as before the Court of Appeals. The trial court on two occasions found for the Petitioner. In its first opinion (Appendix E, *infra*), the Court found that the failure to afford Petitioner a hearing was arbitrary and capricious and a violation of due process

requirements. After a trial, the Court found that Petitioner's absence from work was in "no sense" an absence without explanation in terms of New York Civil Service Rule 5.3(d) and ordered Petitioner's reinstatement. As previously noted this decision was reached over three years after his termination and subsequently reversed by the Appellate Division on the facts.

This matter took seven years to wend its way through the administrative and judicial process. After seven years, the Petitioner was informed *for the first time*, by the New York Court of Appeals, that the New York Civil Service statutes of limitation precluded review by either an administrative or judicial agency. In construing the State statutues of limitations, the New York Court of Appeals noted that the Petitioner's termination by the agency began the statute of limitations, so far as the admnistrative review was concerned, while the denial of the reconsideration request by the agency began the statute of limitations, as far as judicial review was concerned, both to the detriment of petitioner. This construction by the New York Court of Appeals reduces the entire process to a contest of wits between the employee and the state agency. It then becomes a gambling transaction where the employee must determine on his own (without uniform criteria) when his dismissal is "final," and this determination may be completely different depending on whether judicial or administrative relief is sought and the form of the action (writ of certiorari or mandamus). See Practice Commentary, Civil Practice Law and Rules, §217 (McKinney 1973).

Petitioner began protesting his dismissal through the State Civil Service Commission. Although this particular state agency began acting on the Petitioner's protest by arranging a meeting between the Petitioner and Respondent, when such meeting proved inconclusive, the Civil Service Com-

mission dismissed the appeal on the ground that the Petitioner had voluntarily resigned and therefore the Commission was precluded from any action on his appeal. In dismissing the appeal, the Civil Service Commission was interpreting the provisions of a rule it had promulgated. No issue of timeliness of the Appeal was raised by the Commission. According to the calculation of the New York Court of Appeals decision, however, Petitioner had lost nearly three and one-half months of the four months statute of limitations period for judicial review of his termination when the Civil Service Commission dismissed his appeal.

While the purpose of a statute of limitations is to protect the respondent–State of New York–from stale claims, in this instance, the New York statutes of limitation have been interpreted to deny the Petitioner due process protection. The New York Court of Appeals ruled, in effect, that the administrative agency's delay in ruling on the Petitioner's appeal precluded the Petitioner from a judicial hearing on his due process entitlement. Balancing the interest in this case between the State's intention to deny litigation of claims brought by indifferent employees with the State's intention to afford State employees their full due process rights, the application of the statutes of limitation by the State Court of Appeals to dismiss the Petitioner's appeal is improper and does not preclude this Court's review of the Petitioner's basic federal right to due process protection.

CONCLUSION

This Court should accept this Petition for a Writ of Certiorari in order to right the wrongs which have been inflicted upon the Petitioner, and to further clarify when and how due process protection is to be accorded a permanent State employee, especially under the *Arnett v. Kennedy, supra,* decision. This case further presents the important question of the relationship between State administrative and judicial agencies and whether the action of the administrative agency can preclude judicial review of the State employee's due process rights given under the Fourteenth Amendment.

Respectfully submitted,

By _____

John I. Heise, Jr.
861 Pershing Drive
Silver Spring, Maryland 20910
Attorney for Petitioner
HEISE, JORGENSEN & STEFANELLI, P.A.

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

No. 48

In the Matter of
Frank C. McGirr,
Appellant,
vs.
Division of Veterans Affairs,
Executive Department, State of
New York, et al.,
Respondents.

(48) James Roemer, Jr., Albany & Grover T. Odenthal, Staten Island, for appellant.

Louis J. Lefkowitz, Attorney-General (Arlene Silberman & Samuel A. Hirshowitz of counsel) for respondent.

FUCHSBERG, J.:

The threshold and dispositive question before us is whether petitioner timely commenced this article 78 proceeding.

By registered letter dated January 12, 1972, petitioner was advised by his employer, the New York State Division of Veterans Affairs, that pursuant to rule 5.3(d) of the Rules and Regulations of the Department of Civil Service (4 NYCRR 5.3[d]) he was deemed to have "resigned" his position as a State Veterans Counselor.[1] The rule permitted the visitation

[1] Subsequently, when the present case was still wending its way through the courts, we declared rule 5.3(d) invalid as in contravention of the statutory procedures contained in section 75 of the Civil Service Law (*Matter of Johnson* v. *Director, Downstate Med. Center*, 41 NY2d 1061).

of such consequences on an employee for absence without leave and without sufficient explanation for a period in excess of ten working days.[2]

Petitioner sought reconsideration but, on February 15, 1972, was officially advised by the agency that it would adhere to its determination. Before then, on February 10th, he had already appealed to the State Civil Service Commission. On June 12, 1972, that appeal was dismissed on the ground that it could not be brought from a "voluntary" dismissal. The commencement of the present proceeding followed on August 25, 1972.

The invocation by the petitioner of reconsideration by the Division served as a demand upon that agency that it act or perform a duty enjoined on it by law, in this case that it reinstate him. Such a demand is a prelude to the commencement of an article 78 proceeding in the nature of mandamus. The denial of reconsideration contained in the agency's letter of February 15, 1972 constituted a rejection of the demand and set in motion the time within which judicial review had to be requested (*Matter of Sirles*, 49 AD2d 330, 332 affd. on opn. below 40 NY2d 950). Thus, when this proceeding was commenced against the Division on August 25, 1972, the four month period prescribed by CPLR 217 had already expired.

The petitioner also claims that, because the Civil Service Commission did not dismiss the appeal taken to it until June 12, 1972, the commencement of the article 78 proceeding on August 25, 1972 was timely as against it. Assuming *arguendo*, that an appeal from the Division's decla-

[2] Because the specific facts underlying this petitioner's absence are to be found in the majority memorandum at the Appellate Division (56 AD2d 653), we do not repeat them here.

ration that the petitioner had "resigned" was available directly to the Commission itself, in this case it was taken too late.

Under Civil Service Law section 76, subdivison 1, if an employee elects to pursue the path of an administrative appeal, it must be filed "in writing within twenty days after service of written notice of the determination. . . ". In the case before us, the advice of the original determination was given by the Director of the Division as early as January 12th. However, notice of the appeal to the Civil Service Commission was not served before February 10th, the date of the writing by means of which it was communicated. Thus, that the appeal was not taken within the twenty day period is incontrovertible. Moreover, the statute contains no provision for the tolling of the twenty day limitation during the time that an aggrieved party may seek reconsideration of its decision by the employing agency.

Consequently, administative review of the merits of the agency's determination by the Civil Service Commission having been time-barred, the attempt to resurrect the same question by means of this article 78 quest for judicial review of the Commission's dismissal of the belated appeal must fail (cf. *Matter of Davis v. Kingsbury*, 30 A.D. 2d 944, 945, affd. 27 N.Y.2d 567; *Matter of Karaffa v. Simon*, 14 A.D. 2d 978, 979; *Matter of Nelson v. Kelly*, 4 AD2d 596, 598-599).

Finally, in the light of arguments presented on this appeal, we take the opportunity to point out that *Matter of Johnson v. Director, Downstate Medical Center* (41 NY2d 1061) by no means holds that an unexplained absence may not be grounds for dismissal of an employee. Rather, the thrust of our decision in that case is that the "full panoply of procedural due process" required by section 75 of the

Civil Service Law may not be circumvented by an administrative rule creating an irrebuttable presumption of resignation. The letter and spirit of the Civil Service Law interdicts such a facile addition to the available means for bringing about a termination of tenured public employment.

In any event, this proceeding being time-barred for the reasons we have indicated, the order of the Appellate Division should be affirmed.

* * * * * * * * * * * * *

Order affirmed, with costs. Opinion by Fuchsberg, J. All concur.

Decided February 22, 1978

APPENDIX B

___ A D 2d ___ A - November 16, 1976.

2589 E In the Matter of Frank C. McGirr, respondent, v. Division of Veterans Affairs, Executive Department, State of New York, et al., appellants.

Louis J. Lefkowitz, Attorney-General, New York, N.Y. (Arlene R. Silverman and Samuel A. Hirshowitz of counsel), for appellants.

Grover T. Odenthal, Staten Island, N.Y., for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of appellant Votto, Director of the Division of Veterans Affairs, the appeal is from a judgment of the Supreme Court, Richmond County, dated February 23, 1976, which, after a hearing, *inter alia*, directed petitioner's reinstatement to his position as a veteran's counselor.

Judgment reversed, on the law and the facts, without costs or disbursements, and proceeding dismissed on the merits.

Upon our second prior consideration of this matter, we reversed a judgment and remanded to Special Term for resolution at a hearing of the question of fact as to whether petitioner had complied with 4 NYCRR 5.3 (d) (*Matter of McGirr v Division of Veterans Affairs*, 47 AD2d 541, 542). Special Term, after noting its findings of fact Nos. 3, 4, 5 and 6, relating to the several telephone calls made by petitioner reporting his illness, and his physician's letter setting forth his medical condition, concluded that the absence

"can in no sense be termed an absence 'without an explanation' as specified in 4 NYCRR 5.3 (d)." That opinion goes on to state:

> "This determination, flowing necessarily from the findings of fact made at the direction of the Appellate Division, leaves nothing to be determined at any hearing which this Court might order to be held before the Division of Veterans Affairs."

On the contrary, we find upon our review of the minutes of the hearing that clearly petitioner was both "absent without leave" and without a sufficient "explanation" for a period in excess of 10 "work days."

The evidence establishes that, on or about December 7, 1971, the petitioner made a reservation to go to Florida, where he had owned a home for the past seven years. Thereafter, on December 10, 1971, he visited his physician. On December 13, 1971 petitioner reported to work as a veteran's counselor at the Staten Island office of the Division of Veterans Affairs. He made no mention to anyone of his visit to the doctor or of any need for sick leave. The next day, petitioner called his office and stated that he was "sickly." According to petitioner, he did not advise his office how long he expected to be on sick report. Later that day he left for his home in Florida.

On December 20, 1971 the Division received a letter from petitioner's doctor stating that petitioner has been under his care for a respiratory infection and that, in his opinion, his health would be substantially benefited by the removal to a warmer climate. On or about December 21, 1971, petitioner again called his office to state he was "still ill." He

did not mention that he was in Florida. According to the petitioner, he did not adivse his office how long he expected to remain absent.

On Monday, December 27, 1971, petitioner failed to report to work. He did not call in sick or offer any explanation for his absence. Two days later, on December 29, 1971, a letter from the Deputy Director of the Division's New York City office was sent to the petitioner's home on Staten Island. It requested that petitioner have his doctor submit a report indicating the diagnosis of petitioner's present illness. Petitioner testified that he received the letter in Florida on January 3 or 4, 1972 and that he sent a copy of the letter to his doctor with a note asking the doctor to "do as he chose to do with the letter." Petitioner stated that he did not request the doctor to do anything with the letter.

A few days later, on January 7, 1972, petitioner called the Albany office of the Division and asked to speak to a Mr. Parkinson, the Division's Director of Publicity. Mr. Parkinson was unavailable so petitioner spoke with Mr. Thomas Manning, a Deputy Director of the Division. Petitioner was not "sure" whether he told Mr. Manning that he was in Florida. He did ask what could be done about arranging a one or two month leave of absence, with or without pay. Mr. Manning indicated that he thought that petitioner, "probably [could] not get help."

Thereafter, by letter dated January 12, 1972, the petitioner was advised that he had resigned his position as a Veterans' Counselor pursuant to section 5.3 (d) of the Rules and Regulations of the New York State Department of Civil Service. Petitioner received the letter about the third week of January. On or about February 3, 1972 he received a copy

of a letter dated January 13, 1972, which his doctor had sent to the Division. The letter was generally sarcastic, stating that "it is ridiculous for medical reports to be sent to laymen", and did not include any diagnosis of the petitioiner's alleged malady. Petitioner also received from his doctor a medical report listing the results of a physical examination which had been conducted in December, 1971. He said he forwarded this report to his union representative but did not know whether the representative had ever brought the report to the attention of the Division.

Upon the foregoing review of the evidence, it is obvious that petitioner was absent without leave and without any explanation therefor for at least a period of 10 work days. Except for his call to Albany on January 7, 1972, petitioner was not heard from by anybody in the Division from December 21, 1971 through the end of January, 1972. One would expect that, at a minimum, a person with an extended illness would either "call in" once a week or advise his office of the nature and extent of the illness. It strains credulity to believe that the January 7, 1972 call to the Division's Director of Publicity in Albany constituted notification that the petitioner was still sick. Indeed, there is nothing in the record to suggest that Mr. Manning, who took the call intended for Mr. Parkinson, was told that the petitioner was ill.

Under the facts of this case, *Matter of Johnson v. Downstate Med. Center* (52 AD2d 257) does not require petitioner's reinstatement. This court held in *Johnson* (p. 369) that section 5.3 (d) of the Rules and Regulations of the Department of Civil Service "as applied to * * * [the] petitioner" therein, was unconstitutional. The basis of that ruling was the fact that the petitioner therein had not been accorded due process by reason of the fact that his employment had

been terminated without his being allowed a hearing on the validity of the reason for the termination.

In the case at bar, this court had remanded petitioner's CPLR article 78 proceeding to Special Term for a hearing to resolve factual questions relating to petitioner's absence. Petitioner had previously obtained a judgment directing the Division of Veterans Affairs to grant him a hearing, but nevertheless appealed from the judgment because it did not direct his reinstatement. A full hearing was held before Special Term in May and June, 1975, and a decision favorable to petitioner was rendered on December 5, 1975. Petitioner has acquiesced in having his case heard through judicial rather than administrative proceedings, has received a full hearing with a more favorable burden of proof requirement (the Division had to satisfy a "preponderance of the evidence", rather than a "substantial evidence" standard), and has in no way been denied due process of law. The parties to a lawsuit are free to chart their own course and may fashion the basis upon which a particular controversy will be resolved (see *Cullen v Naples*, 31 NY2d 818).

MARGETT, Acting P.J., HAWKINS and MOLLEN, JJ., concur.

RABIN, J., dissents and votes to affirm the judgment, with the following memorandum:

I dissent and vote to affirm. In my opinion, Special Term's finding, as the trier of the facts, is amply supported by the record.

[March 16, 1977]

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 28, 1977.

HON. CHARLES MARGETT, Acting Presiding Justice,
HON. SAMUEL RABIN,)
HON. JOSEPH F. HAWKINS,) Associate Justices
HON. MILTON MOLLEN,)

In the Matter of Frank C. McGirr, Respondent,	)	
v.	)	Order on Appeal from Judgment Civil Action or Proceeding
Division of Veterans Affairs, Executive Department, State of New York, et al., Respondents.	)	

In the above entitled case, the above named Frank C. McGirr, petitioner, having appealed to this court from a judgment of the Supreme Court, Richmond County, dated February 23, 1976, which, after a hearing, *inter alia*, directed petitioner's reinstatement to his position as a veteran's counselor; and the said appeal having been argued by Arlene R. Silverman, Esq., of counsel for the appellant, and argued by Grover T. Odenthal, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby reversed, on the law and the facts, without costs or disbursements, and the proceeding dismissed on the merits.

MARGETT, Acting P.J., HAWKINS and MOLLEN, JJ., concur.

RABIN, J., dissents and votes to affirm the judgment, with a memorandum as contained in the opinion and decision slip of the court herein, dated February 28, 1977.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX C

OPINION

MATTER OF FRANK C. McGIRR — Garbarino
Petitioner — December 5 75

DIVISION OF VETERANS AFFAIRS EXECUTIVE DEPARTMENT, STATE OF NEW YORK et ano — S.P. No 353/1972

Cross-appeals have been taken in this Article 78 proceeding from the judgment of this Court dated April 2, 1974 which directed the Division of Veterans Affairs to grant petitioner a formal hearing pursuant to Section 75 of the Civil Service Law. The matter has been remitted by the Appellate Division to this Court for a hearing on certain questions of fact, and the hearing has been held. On the basis of testimony brought forth at the hearing, the Court makes the following findings of fact:

1. Petitioner has been a member of the New York State Classified Civil Service, Competitive Class since April 5, 1958 and has held a permanent appointment as a Veterans Counsellor assigned to the Richmond County Office of the Division of Veterans Affairs.

2. On December 14, 1971 petitioner was entitled to 36 days of sick leave.

3. On December 14, 1971 petitioner telephoned a fellow employee of the Division of Veterans Affairs at its office in Richmond County and reported that he was sick.

4. On December 20, 1971 petitioner again called that office and again reported sick.

5. The telephone calls by petitioner on December 14 and December 20, 1971 were made pursuant to an established procedure for an employee to report in sick.

6. On December 18, 1971, petitioner's physician sent a medical report concerning petitioners condition to the Division. The Division acknowledged receipt of this letter on December 29, 1971. In the acknowledging letter, the Division stated "In the event we are not satisfied with the severity of your illness, we will have you examined by a State Physician located at 270 Broadway, New York, New York."

7. On January 12, 1972, the Division informed petitioner that he was deemed to have resigned effective December 27, 1971 pursuant to 4 NYCRR 5.3 Subdivision (d).

8. On January 21, 1972, petitioner submitted a written request to the Division for reconsideration and on February 10, 1972 his attorney submitted a similar request.

9. Reconsideration of the January 12, 1972 determination was refused by the Division on February 15, 1972.

10. On February 10, 1972 an appeal before the State Civil Service Commission was requested.

11. On June 12, 1972 the Civil Service Commission declined to take action on the appeal on the basis that there could be no appeal from a voluntary resignation.

On the basis of the above findings of fact especially those numbered 3, 4, 5, and 6 the Court has no alternative but to determine that petitioner's absence which commenced on December 14, 1971 can in no sense be termed an absence "without an explanation" as specified in 4 NYCRR 5.3(d). This determination flowing necessarily from the findings of fact made at the direction of the Appellate Division leaves nothing to be determined at any hearing which this Court might order to be held before the Division of Veterans Affairs.

Judgment is accordingly granted to the petitioner reinstating him to his position with the Division of Veterans Affairs.

Settle judgment on five days notice.

J. A. G.
J.S.C.

At a Special Term, Part One, of the Supreme Court, held in and for the County of Richmond at the County Courthouse in the City of New York on the 23rd day of February, 1976.

PRESENT:

HON. JOHN A. GARBARINO,
Justice.

In the Matter of FRANK C. McGIRR, Petitioner,	:	COUNTER JUDGMENT
For a Judgment against	:	
	:	SP No.
DIVISION OF VETERANS AFFAIRS EXECUTIVE DEPARTMENT OF STATE OF NEW YORK, FRANK V. VOTTO, DIRECTOR, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,	:	353/1972
Respondents.	:	

The above proceeding having been brought pursuant to Article 78 of the Civil Practice Law and Rules for a judgment directing the respondents to reinstate petitioner in his position as Veterans Counsellor, Division of Veterans Affairs, Executive Department, State of New York, and to pay petitioner, the salary for such position from December 29, 1971 to the time he is reinstated and this Court having rendered judgment dated April 2, 1974 which directed the Division of Veterans Affairs to grant petitioner a formal hearing pursuant to Section 75 of the Civil Service Law and cross appeals from this judgment having been taken

as a result of which the Appellate Division, Second Department, remitted this matter to this Court for a hearing on certain questions of fact and the hearing having been duly held and the petitioner having appeared by GROVERT T. ODENTHAL, ESQ. and the respondents having appeared by LOUIS J. LEFKOWITZ, Attorney General of the State of New York by ARLENE SILVERMAN, ESQ., of Counsel, and the Court after due deliberation and on all the papers and proceedings heretofore had on the 5th day of December, 1975 duly made and filed its decision in writing in favor of the petitioner and against the respondents and directing entry of judgment as hereinafter provided, it is

ORDERED AND ADJUDGED that petitioner be reinstated to his position with the Division of Veterans Affairs and it is further

ORDERED AND ADJUDGED that B. Franklin Spencer, Esq. 84 Broadway Ave. East be appointed as referee to hear and determine the sum due the petitioner, after declaration, all offsets, deductions, liens etc. properly excluded pursuant to the applicable provisions of law and Civil Service regulations, and it is further

ORDERED AND ADJUDGED that the referee's fees and disbursements shall be borne equally by the parties.

Enter

/s/ John A. Garbarino
J.S.C.

APPENDIX D

___ A D 2d ___ A - October 22, 1974.

1797 E

In the Matter of Frank C. McGirr, appellant-respondent, v. Division of Veterans Affairs, Executive Department State of New York, Frank V. Votto Director and New York State Department of Civil Service, respondents-appellants.

Fach, Sipp & Hall, Staten Island, N.Y. (Grover T. Odenthal of counsel), for appellant-respondent.

Louis J. Lefkowitz, Attorney General, New York, N.Y. (Arlene R. Silverman and Samuel A. Hirshowitz of counsel), for respondents-appellants.

In a proceeding pursuant to article 78 of the CPLR to annul a determination of respondent Frank V. Votto, Director of the Division of Veterans Affairs, that petitioner's absence from work constituted a resignation from his position of veteran's counselor, (1) petitioner appeals from a judgment of the Supreme Court, Richmond County, dated April 2, 1974, insofar as it fails to direct his reinstatement to his position (the judgment directed the Division of Veterans Affairs to grant petitioner a hearing) and (2) respondents cross-appeal from the judgment in its entirety.

Judgment reversed, on the law, without costs, and proceeding remitted to Special Term for a hearing in accordance herewith.

This record presents a serious question of fact as to whether petitioner complied with the requirements of subdivision (d) of 4 NYCRR 5.3. He claims he called his office and reported sick, thereby providing an ongoing ex-

cuse for his absence, sufficient under rule 5.3. Respondents claim that when petitioner telephoned the office he stated he would be out sick for the rest of the week; that therefore his absence became unexcused as of the Monday following his last telephone call; and that the absence continued unexcused for more than 10 days thereafter. This question of fact can only be resolved at a hearing. Accordingly, it was error to grant judgment to petitioner on the papers alone.

GULOTTA, P.J., MARTUSCELLO, LATHAM, CHRIST and BENJAMIN, JJ., concur.

January 20, 1975. IN RE McGIRR v. DIV. OF VET. AFFAIRS, VOTTO. 1797 E

At a Term of the Appellate Division of the State of New York, Second Judicial Department, held in Kings County on January 20, 1975.

HON. FRANK A. GULOTTA, Presiding Justice,
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM)
HON. MARCUS G. CHRIST) Associate Justices
HON. A. DAVID BENJAMIN)

In the Matter of Frank C. McGirr,
Appellant-respondent,
v.
Division of Veterans Affairs, Executive Department State of New York, Frank V. Votto Director and New York State Department of Civil Service,
Respondents-appellants.

Order on Appeals from Judgment.

In the above entitled cause pursuant to article 78 of the CPLR to annul a determination of respondent Frank V. Votto, Director of the Division of Veterans Affairs, that petitioner's absence from work constituted a resignation from his position of veteran's counselor, (1) the above named Frank C. McGirr, petitioner, having appealed to this court from a judgment of the Supreme Court, Richmond County, dated April 2, 1974, insofar as it fails to direct his reinstatement to his position (the judgment directed the Division of Veterans Affairs to grant petitioner a hearing) and (2) the above named Division of Veterans

Affairs, Executive Department State of New York et al., respondents in the court below, having cross-appealed from the judgment in its entirety; and the said appeals having been argued by Grover T. Odenthal, Esq., of counsel for the appellant-respondent and argued by Arlene R. Silverman, Esq., of counsel for the respondents-appellants, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, without costs, and proceeding remitted to Special Term for a hearing in accordance with the opinion and decision of the court herein, dated January 20, 1975.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX E

At a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse, St. George, Staten Island, New York, on the 2 day of April 1974.

PRESENT:

HON. JOHN A. GARBARINO

JUSTICE.

In the Matter of

FRANK C. McGIRR
Petitioner,

For a Judgment against

DIVISION OF VETERANS AFFAIRS EXECUTIVE DEPARTMENT STATE OF NEW YORK, FRANK V. VOTTO, Director, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE'
Respondents.

JUDGMENT

Index No. SP 353/72

The petitioner, FRANK C. McGIRR, having commenced a special proceeding to compel the respondents to restore petitioner to his Civil Service position as Veterans Counselor, and to pay to him the salary for the period commencing December 27, 1971 when he was wrongfully discharged, and respondent having moved to dismiss the petition on the grounds that it was not brought within the time prescribed by Section 217 of the Civil Practice Law

and Rules, and this Court having denied this motion, which denial was sustained by the Appellate Division by its order of November 19, 1973, and respondents having moved to restore the proceeding to the calendar of this Court and for summary judgment, and the petitioner having cross-moved for summary judgment, and this motion having regularly come on to be heard,

NOW, on the petition, the answer thereto, the memorandums of law submitted by the attorneys for petitioner and by the attorney for respondents, the affidavit of the petitioner verified the 10th day of January, 1974, the affidavit of Frank V. Votto verified the 21st day of December, 1973, and the affidavit of Thomas J. Manning, verified the 4th day of October, 1972 and the exhibit incorporated therein, and on all the papers and the proceedings heretofore had, and due deliberation having been had thereon, and a written decision of this Court having been made therein and filed on the 1st day of February, 1974 granting the respondents' motion to restore the proceedings to the Special Term Calendar of this Court and granting petitioner's cross-motion to the extent of finding that petitioner's two telephone calls constituted an explanation of his absence within the meaning of Rule 5.3d of the Rules and Regulations of the Department of Civil Service, and the Division's action in declaring the alleged unauthorized absence to be a self-executed resignation is arbitrary, capricious and an abuse of discretion, and directing respondents' Division of Veterans Affairs to accord petitioner a hearing upon charges, and directing the entry of judgment as hereinafter provided, it is,

ORDERED, ADJUDGED and DECREED, that judgment be entered in favor of petitioner directing the respondents' Division of Veterans Affairs within thirty (30) days of the entry of this judgment to grant petitioner a formal hearing,

pursuant to Section 75 of the Civil Service Laws of the State of New York, and it is further

ORDERED, ADJUDGED and DECREED, that the Clerk of this Court enter judgment as aforesaid, without the costs or disbursements of this motion.

ENTER

/s/ John A. Garbarino
J.S.C.

Entered April 2, 1974

Augustine Casey
County Clerk, Richmond

FRANK C. MC GIRR,
Petitioner,

DIVISION OF VETERANS AFFAIRS, et al.,
Respondents.

Garbarino
February 1 74

S.P. No. 353/1972

Respondents' motion to restore the above captioned proceeding to the Special Term calendar of this Court is granted.

Petitioner's cross-motion is granted to the extent that the Court will direct the respondent, Division of Veterans Affairs, to accord petitioner a hearing upon charges. Petitioner's two telephone messages to the Staten Island office of the Division – reporting his illness – constituted an "explanation" within the meaning of the Rules for the Classified Service (4 NYCRR 5.3[d]) and the question of the truth or falsity of this explanation is not before the Court. The Division's action in declaring the alleged unauthorized absence to be a self-executed resignation is, on the pleadings and affidavits constituting the record before this Court, arbitrary and capricious, and an abuse of discretion. Fundamental fairness and due process dictate under the circumstances in this case that petitioner be accorded a hearing upon charges and receive a determination thereon. This, of course, will preserve petitioner's right to appeal to the State Civil Service Commission pursuant to Sec. 76(1) of the the Civil Service Law and to have the Division(s) determination reviewed upon a full record. (See: *Hayward v. Cornelius*, 30 A.D. 2d 901 and *Cisco v. McAlevey*, 42 A. D. 2d 567)

Petitioner's cross-motion insofar as it seeks other relief is denied at this time.

Settle judgment on notice.

J.S.C.

Supreme Court, U. S.
FILED
JUN 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1647

In the Matter of FRANK C. McGIRR,

Petitioner,

against

DIVISION OF VETERANS AFFAIRS, EXECUTIVE DEPARTMENT, STATE OF NEW YORK, FRANK V. VOTTO, DIRECTOR, and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Respondents.

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
History of the Case	2
The Opinion of the New York Court of Appeals	4
REASONS FOR DENYING CERTIORARI	
Petitioner failed to timely pursue his New York remedies to review his deemed resignation as a veterans counselor and this petition raises no federal constitutional question	5
Conclusion	7
Cases:	
Arnett v. *Kennedy,* 416 U.S. 134 (1974)	6
Mathews v. *Eldridge,* 424 U.S. 319 (1976)	6
Matter of Sanford v. *Rockefeller,* 35 N.Y. 2d 547, 364 N.Y.S. 2d 450, 324 N.E. 2d 113 (1974), *appeal dismissed* 421 U.S. 973	6, 7
Matter of Williamson v. *Fermoile,* 31 App. Div. 2d 298 N.Y.S. 2d 557 (4th Dept. 1969) *aff'd* 26 N Y 2d 731, 309 N.Y.S. 2d 35, 257 NE 2d 285 (1970)	5

PAGE

Shuttlesworth v. *Birmingham*, 382 U.S. 87, 91 (1965) 6

Other Authorities:

Federal

28 U.S.C. 1257(3) 2

U. S. Constitution, Fourteenth Amendment 3

New York State

New York Civil Practice Law and Rules

Section 217 ..... 4, 5

Article 78 ..... 3, 5

New York Civil Service Law

Section 54 3

Section 75 ..... 3, 6

Section 76 4

Rule 5.3(d) 2, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1647

In the Matter of FRANK C. McGIRR,
Petitioner,

against

DIVISION OF VETERANS AFFAIRS, EXECUTIVE DEPARTMENT, STATE OF NEW YORK, FRANK V. VOTTO, DIRECTOR, and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,
Respondents.

BRIEF IN OPPOSITION

Opinions Below

The opinion of the New York Court of Appeals is reported at 43 N Y 2d 635, 374 N E 2d 123, 403 N.Y.S. 2d 212 (1978), and appears in the petition as Appendix A. The opinion and order of the New York Supreme Court, Appellate Division, Second Judicial Department is reported at 56 App. Div. 2d 653, 392 N.Y.S. 2d 44 (2d Dept. 1976), and appears in the petition as Appendix B. The opinion of the New York Supreme Court, Richmond County is unpublished and appears in the petition as Appendix C. The opinion of the New York Supreme Court, Appellate Division, Second Judicial Department is reported at 47 App.

Div. 2d 541, 363 N.Y.S. 2d 107 (2d Dept. 1974), and appears in the petition as Appendix D. The opinion of the New York Supreme Court, Richmond County is unpublished and appears in the petition as Appendix E.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

Question Presented

Does petitioner's claim that he was entitled to a hearing prior to his termination as a New York State veterans counselor raise a constitutional question where the New York Court of Appeals did not review the merits of petitioner's claim because he failed to institute judicial proceedings in the New York courts within the limitation period prescribed by State law?

History of the Case

On January 12, 1972, petitioner was informed by Frank V. Votto, Director of the Division of Veterans Affairs, that he had been separated from his position as a State veterans counselor in accordance with New York State Civil Service Department Rule 5.3(d) (McKinney 1973) which provided that when "an employee is absent without leave and without an explanation therefor for a period of 10 work days, such absence shall be deemed to constitute a resignation effective on the date of the commencement of such absence."

On February 9, 1972, in response to a letter dated January 21, 1972 mailed by petitioner to Mr. Votto, Mr. Votto informed petitioner that this determination was not subject to change and that if he disagreed, he had his right to legal recourse.

On February 15, 1972, petitioner filed a letter of appeal with the New York Civil Service Commission. On June 12, 1972, the Civil Service Commission informed petitioner that the dismissal was not subject to review.

Thereafter, petitioner instituted a proceeding under New York Civil Practice Laws and Rules Article 78 (McKinney 1963) to overturn his resignation by service of a petition on the Department of Veterans Affairs on August 25, 1972 and on the Department of Civil Service on September 8, 1972. Petitioner claimed, *inter alia*, that as a tenured civil service employee he was entitled to a hearing under the Fourteenth Amendment prior to his involuntary resignation. He also argued that he was entitled to a hearing pursuant to New York Civil Service Law § 75 (McKinney 1973) which provides for an administrative hearing when a permanent employee is discharged from his job for disciplinary reasons. He sought reinstatement to his position as a veterans counselor and backpay.*

On October 6, 1972 respondents moved to dismiss the petition as time barred.**

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* Petitioner is over the mandatory retirement age of seventy applicable to his position as a veterans counselor and the reinstatement issue is now moot. New York Civil Service Law § 54 (McKinney 1973).

** This proceeding has a lengthy procedural history. On January 23, 1973, the Richmond County Supreme Court denied respondents' motion to dismiss the appeal. An interlocutory appeal was taken to the New York Supreme Court, Appellate Division, and on October 15, 1973 the order was affirmed. Thereafter, on April 2, 1974 the Richmond County Supreme Court granted petitioner summary judgment. On January 29, 1975, the New York Supreme Court, Appellate Division reversed and remanded to the Richmond County Supreme Court for a hearing. A hearing was held and the Richmond County Supreme Court granted petitioner judgment on February 23, 1976. The New York Supreme Court, Appellate Division reversed and dismissed the petition on February 28, 1977. Petitioner then appealed to the New York Court of Appeals.

The Opinion of the New York Court of Appeals

The New York Court of Appeals did not reach the merits of petitioner's constitutional and statutory claims because it found that petitioner had not complied with the four month limitation period under New York law for instituting a petition seeking review of his termination. The Court held that when petitioner learned on February 15, 1972 that the Division of Veterans Affairs would not reinstate him to his position as a veterans counselor, the time within which judicial review had to be requested was set in motion. When the proceeding was commenced against the Division on August 25, 1972, the four month limitation period, applicable to this type of review under New York CPLR 217 (McKinney 1972), had already expired.

Insofar as petitioner sought to appeal to the Civil Service Commission, the Court of Appeals held that even assuming *arguendo* only that an appeal to the Commission from petitioner's resignation was available, it was taken too late. New York Civil Service Law § 76(1) (McKinney 1973) provides that an administrative appeal must be filed within 20 days after service of written notice of the determination sought to be reviewed. Petitioner received written notice of the original determination as early as January 12, 1972. His notice of appeal to the Civil Service Commission was not served before February 10, 1972. It was, thus, incontrovertible that the appeal was not taken within the twenty day period.

REASONS FOR DENYING CERTIORARI

Petitioner failed to timely pursue his New York remedies to review his deemed resignation as a veterans counselor and this petition raises no federal constitutional question.

The litigation by petitioner was disposed of as untimely under New York statute.

Petitioner, an employee of the State Division of Veterans Affairs, had been dismissed for unexcused absences for more than ten days under a Department of Civil Service Rule which deemed such absences to amount to a resignation. Petitioner sought reconsideration from the employer, the Division of Veterans Affairs, which was unsuccessful. After attempting an appeal to the State Civil Service Commission, he commenced a proceeding to review the validity of the termination of his employment under New York Civil Practice Law and Rules Article 78 (McKinney 1963). The denial of reconsideration by the Division of Veterans Affairs was by letter mailed on February 9, 1972 and the judicial proceeding was commenced on August 25, 1972, over six months later.

Under New York law, a proceeding to review a dismissal must be commenced within four months of the official action of dismissal or a demand for reinstatement in case of a claimed illegality (New York CPLR 217) (McKinney 1972). This period of limitations is mandatory and jurisdictional. No court can extend this period of limitations. *Matter of Williamson* v. *Fermoile,* 31 App. Div. 2d 438, 298 N.Y.S. 2d 557 (4th Dept. 1969), *aff'd* 26 N Y 2d 731, 309 N.Y.S. 2d 35, 257 N E 2d 285 (1970). The Court of Appeals here held that the request for reconsideration served as a demand for reinstatement, the agency's denial of reconsideration constituted a rejection of such demand and the four month period within which judicial review had to

be requested was set in motion. In consequence, the proceeding was untimely under New York law and could not be maintained.

The New York Court of Appeals also pointed out that even assuming *arguendo* only that an appeal to the Civil Service Commission was appropriate after a Rule 5.3(d) resignation, such an appeal must be filed within 20 days. Again, petitioner failed to comply with this procedural rule.*

This disposition of the judicial proceeding upon state law questions is binding, *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 91 (1965), and is dispositive of the present application.

Although the Court of Appeals, therefore, did not reach the merits, prior thereto, the Appellate Division had considered petitioner's claim that he was entitled to a hearing on his termination. The Appellate Division held that in the present case the petitioner had a full trial before the trial court and had thereby received full due process of law. That court found the facts against the petitioner—that, in fact, he had inexcusably absented himself from his place of employment for an extended period (Florida) without leave and without explanation as required by the Civil Service Rule. In view of the full trial accorded petitioner, it would be an impotent act to suggest the lurking of a due process question, even apart from the bar of the period of limitations. The fact that the hearing followed the imposition of discipline for the extended absences would not warrant any constitutional challenge. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Matter of Sanford* v. *Rockefeller,* 35 N.Y.

* In point of fact no such appeal lies. The Civil Service Commission only reviews disciplinary proceedings upon an administrative record after a hearing held pursuant to New York Civil Service Law § 75 (McKinney 1973). At bar, petitioner was attacking a rule of the Department of Civil Service and his sole remedy was a judicial proceeding to have the rule declared invalid.

2d 547, 364 N.Y.S. 2d 450, 324 N.E. 2d 113 (1974), *appeal dismissed* 421 U.S. 973.

In sum, petitioner, who was represented by an attorney at least as early as February 10, 1972, failed to timely pursue his New York remedies and this application raises no constitutional claim for this Court to review.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied.

Dated: New York, New York
June 20, 1978

Respectfully submitted,

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